Supreme Court, U.S.
FILED
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(4)

No. 94-395

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 1, 1994
CERTIORARI GRANTED OCTOBER 31, 1994

26 pp

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U.S. DISTRICT COURT
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(LOS ANGELES)

Civil Docket for Case #: 91-CV-5286

LORI WILLIAMS, RABIN, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS
9-30-91	1. Complt. Issd sums Demand for J/T Case may be ref'd to U.S. Mag Judge Eick for discvry.
10/30/91	2. Note of change of address of cnsl for petitioner. pltf.
11/4/91	3. Ret of orig sums; P/S of S/C on Lisa Bracamontes, auth agent for scv of proc for USA by persoanl svc on 11/28/91.
12/26/91	4. ANSWER to complt. Deft. USA
1/21/92	5. Joint rpt of early mtg. Deft
2/5/92	6. CRTS ORD: That PTC is set for 6/1/92 @ 10am ctrm 9, Trial is set for 6/16/92 @9am
2/24/92	7. CRTS ORD: That case is set for Stat/Sttlmt Conf by phone conf on 3/5/92 @4pm.
2-27-92	8. Jnt stat rpt.
3/5/92	9. Mo: Off the record call from chambers. PTC is reset for 6/8/92 @10am w/L.R. 9 papers to be fld by 6/3/92. Cnsl may set their own discov cutoff date.C/R: None

DATE	PROCEEDINGS
4/28/92	10. Ntc of mot & mot for S/J. deft. Rtnbl 6/1/92 @10am ctrm 9 LODGED Prop stmt & jdmt ?
4/29/92	11. Ntc of rescheduling mot for S/J to 6/1/92 @10am ctrm 9. dft.
5/11/92	12. Ntc of mot & x-mot for S/J. plf. Rtnbl 6/8/92 @10am ctrm 9 LODGED Prop Stmt & S/J. plf
5-7-92	13. Ex-parte plf's mot for cont of dft's mot for S/J; ex-parte pltf's mot for cont of trial. plf LODGED prop ORD. (Fwd'd to CRD)
5-8-92	14. ORD to cont dft's mot for S/J to 6-8-92, 10AM. opp papers by the plf will be due NLT 5-25-92; pltf files a cross-mots for S/J, such mot must be srvd by mail NLT 5- or if personally srvd NLT 5-18-92. Tht the trial this matter contd to 6-30-92, 9AM. & PTC contd to 6-22-92, 10AM.
5/22/92	15. Opp to mot for S/J. plf LODGED Prop ord (Fwd to CRD)
5/26/92	16. Opp to x-mot for S/J. dft
6/2/92	17. Reply to opp to the mot for S/J. dft
6/8/92	18. MO: That the mots for S/J are taken under subm. The PTC & trial dates are VACATED. C/R: S. Seffens
9/2/92	19. CRTS ORD: That pltfs mot for S/J is DENIED. Dfts mot for S/J is GRANTED. (ENT 9/3/92) MD JS-6 Mld cpys/ntc ENTERED ON ICMS ——
9-10-92	20. PLF. FLD NTC OF APP TO THE 9TH C/A FRM CRTS ORD FLD ON 9-2-92. FEES BILLED.
9/18/92	21. Trans desig & ordng form.

DATE	PROCEEDINGS
11/2/92	22. Receipt for rptrs trannsc had on 6/8/92.
1/25/93	LODGED cc Ord frm 9th CCA granting govts mot for ext of time to file ans brief.
3/23/93	FWD to 9th CCA (1) vol orig rptrs transc
2/8/94	FWD to 9th CCA (2) vols orig clks file.
2/8/94	FWD to 9th CCA (2) vols orig clks file.
6/15/94	LODGED cc ord frm 9th CCA reversing & remanding.
6/16/94	23. M.O.: Flng & spreading of mandate set for 6/27/94 @10am.
6-27-94	24. MO—tht the jgm of the 9th CCA is hereby fld and spread the crt finds there is jurisdiction; should the plf bring the actn, and based on the ptys stip the jgm will be ent in favor of the plf; the crt is informed tht the dft may ptn for Certerori; the crt ords a conf call for 8-19-94 @ 12:00 noon for a rpt on tht process. (ENT 7-7-94). C/R—Rosa Toribach.
7/7/94	25. Ntc of change of address. plf
*6/22/94	26. MO: That time of fing & spreading of mandate frm (th CCA on 6/27/94 will be 2:15 C/R: None
8/8/94	27. Ntc of stat of actn; req crt tk phone conf off cal. dft, USA
8/19/94	28. MO: conf. call of record. Crt ord actn stayed peding the fing of writ & ruling on writ by the U.S. Supreme Court. Fur conf call set for 11/17/94 @noon. C/R:N/A
7/8/94	RCVD frm 9th CCA (2) vol orig file. RCVD frm 9th CCA (1) vol rptrs transc dtd 6/8/92
11/17/94	29. M.O.: Conf call. U.S. Supreme Court has taken case. Action stayed

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-56207

LORI RABIN WILLIAMS, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
10/1/92	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS due 10/15/92 for Philip Garrett Panitz; appellant's designation of RT is due 9/21/92; appellee's designation of RT is due 9/30/92; appellant shall order transcript by 10/13/92; court reporter shall file transcript in DC by 11/10/92; certificate of record shall be filed by 11/17/92; appellant's opening brief is due 12/28/92; appellees' brief is due 1/26/93; appellants' reply brief is due 2/9/93; [92-56207] (dr)
10/19/92	Filed Philip Garrett Panitz for Appellant Lori Rabin Williams Civil Appeals Docketing Statement served on 10/15/92 (to CONFATT) [92-56207] [92-56207] (sw)
11/4/92	Rec'd. notice of appearance of Kevin M. Brown & Gary Allen. (Withdrew as counsel: attorney Sandra R. Brown for USA [92-56207] (jlc)
11/6/92	Case released from Pre-Briefing Conference program. (jr)

DATE	PROCEEDINGS
12/28/92	Filed original and 15 copies Appellant Lori Rabin Williams opening brief (Informal: n) 18 pages and five excerpts of record; served on 12/23/92 [92-56207] (sw)
1/22/93	Filed motion & order (Dpty Clk—cag): The ct is in receipt of the Govt's mtn for an ext. of time in which to file the ans brief. The mtn is granted; ans brief due 2/16/93; opt. reply due 14 days from svc of the ans brief. Ct records do not currently reflect that the dc has issued the COR. Aplt shall monitor the issuance of the cert.; absence of the cert. will block resolution of the appeal. (Motion recvd 1/19/93) [92-56207] (sw)
2/19/93	Filed original and 15 copies appellee USA's 37 pages brief, served on 2/16/93. [92-56207] (sa)
2/25/93	Filed certificate of record on appeal RT filed in DC 11/02/92 [92-56207] (rmw)
3/5/93	10 day oral extension by phone of time to file Appellant's reply brief. [92-56207] appellants' reply brief due 3/15/93; (mag)
3/15/93	Filed original and 15 copies Lori Rabin Williams reply brief, (Informal: n) 11 pages; served on 3/12/93. [92-56207] (sa)
3/26/93	Filed, as of 2/25/93, certified record on appeal in 1 Vol. (total): 1 RTs (orig) [92-56207] [92-56207] (gva)
11/4/93	Calendar check performed [92-56207] (mw)
11/8/93	Received ltr from USA dtd 11/4/93 re: additional citations, * * * * * [92-56207] (rc)
12/16/93	Calendar check performed [92-56207] (dd)
1/6/94	Calendar materials being prepared. [92-56207] [92-56207] (dd)

DATE	PROCEEDINGS
1/12/94	CALENDARED: Pasadena March 10, 1994 9:00 a.m. Courtroom 3 [92-56207] (dd)
3/10/94	ARGUED AND SUBMITTED TO Harry PREGERSON, Diarmuid F. O'SCANNLAIN, Ferdinand F. FERNANDEZ [92-56207] (dr)
5/9/94	Received ltr dated 5/6/94 from Gary Allen re: additional citations, pursuant to FRAP 28(j); served on 5/6/94 (Panel) [92-56207] (gva)
5/19/94	FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Harry PREGERSON; Diarmuid F. O'SCANNLAIN, author; Ferdinand F. FERNANDEZ.) FILED AND ENTERED JUDGMENT. [92-56207] (sa)
5/23/94	Rec'd notice of change of address from Philip Garrett Panitz for Aplt dated 5/17/94. (Casefiles) [92-56207] (gva)
5/27/94	Filed Appellant Lori Rabin Williams bill of costs, served on 5/26/94 [92-56207] (tsp)
6/10/94	MANDATE ISSUED costs taxed against aple for 770.60c [92-56207] (crw)
8/17/94	Filed Supreme Court order (SC Date: 8/9/94) granting an ext to file petition for writ of certiorari to 9/16/94. [92-56207] (jr)
9/14/94	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-395 filed on 9/1/94. [92-56207] (crw)
11/21/94	Filed Supreme Court order (SC Date: 10/31/94): The petition herein for a writ of certiorari to the USCA for the the 9th Circuit is granted (Panel) [92-56207[(gva)

[Filed Apr. 28, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 91-5286 WMB (Ex)

LORI (RABIN) WILLIAMS, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Date: June 1, 1992

The Motion For Summary Judgment for the United States of America came on for hearing before the Honorable Wm. Matthew Byrne, Jr., United States District Judge. Based on the pleadings filed in connection with the motion and all matters properly a part of the record, the Court finds the following uncontroverted facts and makes the following conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. At one time plaintiff Lori (Rabin) Williams and Jerrold Rabin were husband and wife.

2. In April 1987, Jerrold Rabin (hereinafter "taxpayer-Rabin") and plaintiff purchased real estate located at 15915 Alcima, Pacific Palisades, California.

3. On October 20, 1988, taxpayer-Rabin and plaintiff executed a transfer agreement in which taxpayer-Rabin transferred all of his interest in the Alcima property to the plaintiff as her separate property.

4. In return, the plaintiff agreed to assume the following liabilities:

(1) A trust deed in favor of the Home Savings of America securing a loan with an unpaid balance of approximately $113,300.00. (Both plaintiff and taxpayer-Rabin jointly signed the deed on May 7, 1975.)

(2) A trust deed in favor of the First Charter Bank securing a loan with unpaid balance in the approximate amount of $325,000.00. (Both plaintiff and taxpayer-Rabin jointly signed the loan agreement in August 1985.)

(3) A judgment lien in favor of the F.D.I.C. in the approximate amount of $210,000.00.

5. Additionally, pursuant to this agreement, taxpayer-Rabin agreed to indemnify the plaintiff for payment of any other liens on the Alcima property, and that, subject to reimbursement by the plaintiff upon sale of the subject property, he would continue to pay the installment loan payments, the homeowners insurance premiums, all property tax assessments, and all repair, maintenance, and cleaning charges in connection with the property.

6. On October 25, 1988, taxpayer-Rabin recorded a quitclaim deed, with zero documentary transfer tax and title taken in the name of "Lori Williams, an unmarried woman."

7. On or about May 9. 1989, plaintiff entered into an escrow agreement to sell the Alcima property.

8. On June 26, 1989, the Internal Revenue Service recorded a nominee lien in the name of Lori Rabin aka Lori Williams as nominee, agent, holder of beneficial interest for trustee, transferee, or alter-ego of Marco Pollo 1, a partnership, Jerrold Rabin, Gen. Ptr., and any right, title or interest that Marco Pollo 1, a partnership, Jerrold Rabin, Gen. Ptr., may have or may acquire in that property described therein.

9. On or about July 3, 1989, the escrow closing shows that the following creditors were paid through escrow:

(1) Home Savings of America in the amount of $112,992.29 on the basis of a trust deed recorded on May 7, 1975;

(2) First Charter Bank in the amount of $340,903.82 on the basis of a trust deed recorded on September 3, 1985;

(3) Edith Rabin (taxpayer-Rabin's mother) in the amount of $100,000.00 on the basis of a trust deed recorded on April 14, 1988;

(4) Estate of Aileen Buckley (taxpayer-Rabin's sister) in the amount of $36,000.00 on the basis of a trust deed recorded on April 14, 1988;

(5) Edith Rabin (taxpayer-Rabin's mother) in the amount of $40,000.00 on the basis of a trust deed recorded on April 14, 1988;

(6) The FDIC in the amount of $227,327.47 on the basis of a judgment lien recorded on January 13, 1986;

(7) California Employment Development Department in the amount of $2,801.58 on the basis of two liens recorded against Arthur Lee Sloan/Jerrold F. Rabin/Marco Pollo on September 22, 1988 and April 27, 1989, respectively;

(8) California Employment Development Department in the amount of $672.12 on the basis of two liens recorded against Arthur Lee Sloan/Jerrold F. Rabin/Marco Pollo on September 22, 1988 and April 27, 1989, respectively;

(9) The Internal Revenue Service in the amount of $41,937.04 on the basis of three Notices of Federal Tax Lien recorded against Marco Pollo 1/Jerrold Rabin on November 10, 1988, June 22, 1989, and July 24, 1989; and,

(10) The Internal Revenue Service in the amount of $1,308.30 on the basis of a Notice of Federal Tax

Lien recorded against Rabin Drilling Program 1983-A Ltd. on September 21, 1987

10. On January 19, 1989, the plaintiff filed a petition for dissolution of marriage in the Superior Court of California.

11. On March 19, 1990, a Judgment was entered dissolving the marriage.

12. On December 31, 1987, Jerrold Rabin registered with the State Board of Equalization a notification that he was no longer a partner with Marco Pollo 1, partnership.

13. Plaintiff is not the taxpayer.

14. Any conclusions of law deemed more appropriately designated as an uncontroverted fact is incorporated here as an uncontroverted fact.

CONCLUSIONS OF LAW

1. 28 U.S.C. § 1346(a)(1) is a waiver of sovereign immunity which must be construed narrowly. See, *Busse v. United States*, 542 F. 2d 421, 424-25 (7th Cir. 1976).

2. Under 28 U.S.C. § 1346(a)(1), only a "taxpayer" can bring a refund suit. See, *Snodgrass v. United States*, 834 F. 2d 537, 539 (5th Cir. 1987); *Busse v. United States*, 542 F. 2d 421, 424-25 (7th Cir. 1976); *Eighth Street Baptist Church, Inc. v. United States*, 431 F. 2d 1193, 1194 (10th Cir. 1965); *Phillips v. United States*, 346 F. 2d 999, 1000 (2d Cir. 1965); *McCune v. United States*, 36 A.F.T.R. 2d 75-5487 (C.D. Cal. 1975)

3. The "taxpayer" is the person against whom the tax was assessed. See, *Busse v. United States*, 542 F. 2d 421, 424-25 (7th Cir. 1976).

4. A person who is not liable for a tax but pays it to remove a lien against her property may not sue for a refund under 28 U.S.C. § 1346(a)(1). *Busse v. United States*, 542 F.2d 421, 424-25 (7th Cir. 1976); *Hummel v United States*, 494 F.Supp. 1003 (S.D. Iowa 1980).

5. The statutes allow a non-taxpayer to file a wrongful levy suit pursuant to 26 U.S.C. § 7426 and 28 U.S.C. § 1346(e), as noted above, a quiet title action under 28 U.S.C. § 2410, or to apply for a certificate of discharge of the tax lien pursuant to 26 U.S.C. § Section 6325 (b)(3). See *Busse v. United States*, 542 F.2d 421, 425 (7th Cir. 1976).

6. A non-taxpayer does not have a remedy against the United States to recover the payment made on behalf of the taxpayers to remove an encumbrance from the title to her land. See *Busse v. United States*, 542 F.2d 421, 425 (7th Cir. 1976).

7. Unless the person suing, pursuant to 26 U.S.C. § 1346(a)(1), is the one who was assessed and potentially owes the tax, no standing exists. See *Home Indemnity Co. v. Brennan*, 430 F.Supp. 828, 830 (S.D.N.Y. 1977).

8. A non-taxpayer may have a cause of action against the taxpayer, but she has no valid claim against the United States. *See Fidelity & Casualty Co. of New York v. United States*, 203 Ct. Cl. 484, 490 F.2d 960, 966 (Cl.Ct. 1974).

9. *United States v. Halton Tractor Co.*, 258 F.2d 612 (9th Cir. 1958) has no viability following the 1966 enactment of the wrongful levy provisions of 26 U.S.C. § 7426. *See* Senate Report No. 1708, 89th Cong., 2d Sess., *reprinted in* 1966-3 *United States Code Cong. & Adm. News*, at 3750; *Busse v. United States, supra*, at 425; *Arndt v. United States*, 493 F.Supp. 552, 553 (S.D. Tex. 1980); *Hummel v. United States, supra*, at 1005.

10. Section 1346(a)(1) (26 U.S.C.) does not provide a waiver of sovereign immunity as to the United States in this action.

11. Section 1346(a)(1) (26 U.S.C.) does not provide this Court with a grant of subject matter jurisdiction for this action.

12. There being no genuine issues as to any material fact and defendant being entitled to judgment as a matter

of law, summary judgment shall be entered in favor of defendant. Rule 56, Federal Rules of Civil Procedure.

13. Any uncontroverted fact deemed more appropriately designated as a conclusion of law is incorporated here as a conclusion of law.

DATED:————————

/s/ William Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

Presented by:

LOURDES G. BAIRD
United States Attorney
MASON G. LEWIS
Assistant United States Attorney
Chief, Tax Division

/s/ Sandra R. Brown
SANDRA R. BROWN
Assistant United States Attorney
Attorneys for United States
of America

[Certificate of Service Omitted in Printing]

[Lodged May 11, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

————

[Title Omitted in Printing]

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STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Date: June 8, 1992
Time: 10:00 a.m.
Courtroom: 9
312 North Spring Street
Los Angeles, California

The Motion For Summary Judgment for the United States of America came on for hearing before the Honorable Wm. Matthew Byrne, Jr., United States District Judge. Based on the pleadings filed in connection with the motion and all matters properly a part of the record, the Court finds the following uncontroverted facts and makes the following conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. At one time Plaintiff Lori (Rabin) Williams and Jerrold Rabin were husband and wife.

2. In April 1987, Jerrold Rabin and Plaintiff purchased real estate located at 15915 Alcima, Pacific Palisades, California.

3. On October 20, 1988, Jerrold Rabin and Plaintiff executed a transfer agreement in which Jerrold Rabin transferred all of his interest in the Alcima property to the Plaintiff as her separate property.

4. In return, the Plaintiff agreed to assume the following liabilities:

(1) A trust deed in favor of the Home Savings of America securing a loan with an unpaid balance of aproximately $113,300.00. (Both Plaintiff and Jerrold Rabin jointly signed the deed on May 7, 1975.)

(2) A trust deed in favor of the First Charter Bank securing a loan with unpaid balance in the approximate amount of $325,000.00. (Both Plaintiff and Jerrold Rabin jointly signed the loan agreement in August 1985.)

(3) A judgment lien in favor of the F.D.I.C. in the approximate amount of $210,000.00.

5. Additionally, pursuant to this agreement, Jerrold Rabin agreed to indemnify the Plaintiff for payment of any other liens on the Alcima property, and that, subject to reimbursement by the Plaintiff upon sale of the subject property, he would continue to pay the installment loan payments, the homeowners insurance premiums, all property tax assessments, and all repair, maintenance, and cleaning charges in connection with the property.

6. On October 25, 1988, Jerrold Rabin recorded a quitclaim deed, with zero documentary transfer tax and title taken in the name of "Lori Williams, an unmarried woman."

7. On or about May 9, 1989, Plaintiff entered into an escrow agreement to sell the Alcima property.

8. On June 26, 1989, the Internal Revenue Service recorded a nominee lien in the name of Lori Rabin aka Lori Williams as nominee, agent, holder of beneficial interest for trustee, transferee, or alter-ego of Marco Pollo 1, a partnership, Jerrold Rabin, Gen. Ptr., and any right, title or interest that Marco Pollo 1, a partnership, Jerrold Rabin, Gen. Ptr., may have or may acquire in that property described therein.

9. On or about July 3, 1989, the escrow closing shows that the following creditors were paid through escrow:

(1) Home Savings of America in the amount of $112,992.29 on the basis of a trust deed recorded on May 7, 1975;

(2) First Charter Bank in the amount of $340,-903.82 on the basis of a trust deed recorded on September 3, 1985;

(3) Edith Rabin (Jerrold Rabin's mother) in the amount of $100,000.00 on the basis of a trust deed recorded on April 14, 1988;

(4) Estate of Aileen Buckley (Jerrold Rabin's sister) in the amount of $36,000.00 on the basis of a trust dede recorded on April 14, 1988;

(5) Edith Rabin (Jerrold Rabin's mother) in the amount of $40,000.00 on the basis of a trust deed recorded on April 14, 1988;

(6) The FDIC in the amount of $227,327.47 on the basis of a judgment lien recorded on January 13, 1986;

(7) California Employment Development Department in the amount of $2,801.58 on the basis of two liens recorded against Arthur Lee Sloan/ Jerrold F. Rabin/Marco Pollo on September 22, 1988 and April 27, 1989, respectively;

(8) California Employment Development Department in the amount of $672.12 on the basis of two liens recorded against Arthur Lee Sloan/ Jerrold F. Rabin/Marco Pollo on September 22, 1988 and April 27, 1989, respectively;

(9) The Internal Revenue Service in the amount of $41,937.04 on the basis of three Notices of Federal Tax Lien recorded against Marco Pollo 1/Jerrold Rabin on November 10, 1988, June 22, 1989, and July 24, 1989; and,

(10) The Internal Revenue Service in the amount of $1,308.30 on the basis of a Notice of Federal Tax Lien recorded against Rabin Drilling Program 1983-A Ltd. on Sepytember 21, 1987.

10. On January 19, 1989, the Plaintiff filed a petition for dissolution of marriage in the Superior Court of California.

11. On March 19, 1990, a Judgment was entered dissolving the marriage.

12. On December 31, 1987, Jerrold Rabin registered with the State Board of Equalization a notification that he was no longer a partner with Marco Pollo 1, partnership.

13. Plaintiff is not the taxpayer.

14. Any conclusions of law deemed more appropriately designated as an uncontroverted fact is incorporated here as an uncontroverted fact.

Plaintiff hereby incorporates by reference all of the Exhibits attached to defendant's Motion for Summary Judgment as evidence for the uncontroverted facts set forth above.

CONCLUSIONS OF LAW

1. Under U.S.C. Section 1346(a) a refund suit can be maintained by a person against whom an internal revenue tax has been erroneously or illegally collected, not just a person against whom such a tax has been erroneously or illegally assessed. *Mona Martin v. United States*, 895 F.2d 992 (4th Cir. 1990); *United States v. Halton Tractor Company*, 258 F.2d 612 (9th Cir., 1958); *Parsons v. Anglin*, 143 F.2d 534 (9th Cir., 1944); *David v. United States*, 551 F.Supp. 850 (C.D. Cal. 1982) *Adams v. United States*, 380 F.Supp. 1033 (D. Mont. 1974); *Noonis v. United States*, 576 F. Supp. 853 (U.S.D.C. Wes.Dis.Texas 1983).

2. The enactment of 26 U.S.C. Section 7426 has not preempted the Ninth Circuit Court of Appeals decisions

in *United States v. Halton Tractor Co.*, 258 F.2d 612 (9th Cir., 1958) and *Parsons v. Anglin*, 143 F.2d 534 (9th Cir., 1944) on the issue of the standing of a third party to sue for a refund. See *David v. United States*, 551 F. Supp. 850 (C.D. Cal. 1982).

3. The enactment of 26 U.S.C. § 7426 was intended to expand the rights of third parties to maintain a refund suit. See Senate Finance Committee Report No. 1708, H.R. 11256, reprinted in 1966-3 IRS Cumulative Bulletin 876 et. seq.

4. There is no basis under 28 U.S.C. § 1346 for distinguishing between third parties against whom taxes were erroneously or illegally collected based on their perception as to whether or not they actually owed the tax at the time of collection. *Mona Martin v. United States*, 895 F.2d 992 (4th Cir., 1990).

5. The plaintiff has standing in this action pursuant to the authority of Title 28 U.S.C. 1346(a)(1) to sue for a refund of taxes.

6. Title 28 U.S.C. 1346(a)(1) provides a waiver of sovereign immunity as to the United States in the matter.

7. There being no genuine issues as to any material fact and plaintiff being entitled to judgment as a matter of law, summary judgment shall be entered in favor of plaintiff. Rule 56, Federal Rules of Civil Procedure.

Dated: ————

WM. MATTHEW BYRNE, JR.
United States District Judge

Presented by:

LAW OFFICES OF STAKER & GOSE

/s/ Philip Garrett Panitz
PHILIP GARRETT PANITZ
Attorney for the Plaintiff

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

June 8, 1992

* * * *

[3] THE CLERK: Item 7, CV-91-5286, Lori Williams versus the United States. Cross-motions for summary judgment.

Counsel, state your appearances, please.

MR. PANITZ: Your Honor, Philip Garrett Panitz for the plaintiff, Lori Rabin Williams.

MS. BROWN: Good morning, Your Honor. Sandra Brown, Assistant United States Attorney, on behalf of the United States.

THE COURT: I feel like we are sort of at a stop-off station for the final resolution of this case. It's a good issue, an issue that the Ninth Circuit's going to have to address.

I am a little bit concerned about it only to this extent. You have only got $40,000 involved here. I know how difficult it is to settle tax cases, but if there is any possibility—I feel a little badly that the plaintiff, no matter what happens, is going to have to pay the expense of finding out what the Court of Appeals is going to do, and I think there's a fair possibility, that you may even have to go further than that to get the final answer. In this case, it doesn't warrant it.

If you think there is any possibility of resolving [4] it, I would suggest you try to do so. If there is not, we will just go ahead and take your best shot at it.

MR. PANITZ: Your Honor, I think any possible settlement in this case would have to come after your ruling in this matter on the summary judgment motions.

THE COURT: I doubt that frankly, but regardless—obviously, if I rule for the Government, there won't be any settlement discussions. If I rule for you, there possibly would be some, but they don't want that decision sitting out there. They have got a couple of old Ninth Circuit cases that they are—and the Fourth Circuit case. I think the last thing the Government is going to want is any opinions out there—even from the District Court judge—that is contrary to their position that's eventually going to be heard.

MR. PANITZ: I think they substantial take a risk, though, in taking this case up to the Ninth Circuit, essentially taking a risk that Mona Martin [phonetic] becomes the law in the Ninth Circuit.

THE COURT: Well, anyway, as long as you all have explored it. I just wanted to give you that opportunity.

Let's go ahead then. The question obviously is whether there is a waiver of sovereign immunity for a nontaxpayer.

MR. PANITZ: That's correct, Your Honor, and I [5] believe both sides in their motions have essentially stipulated that the taxes were erroneously collected. It is just a question of whether or not there is a standing under 1346(a)(1).

THE COURT: There is no question that the equities are with the plaintiff in the case, not having any way to remedy the wrong that might have been perpetrated upon it, but no one is going to ever say that there is any equities in the tax law, so from that, though, really comes the question should she be given some remedy by a somewhat nonexplicit waiver of sovereign immunity to be able to pursue her claim against the government?

In this particular case, the relief that has been—the statutory relief that has been given doesn't really apply, so her only relief is to be able to come into court and file this refund action. The problem that you have is that the Supreme Court is obviously now tightening sovereign immunity cases. They—you have got all of the Circuits saying the Fourth. That is contrary to your position.

MR. PANITZ: Your Honor, I don't believe that's the case.

THE COURT: The Fourth is now—you like that Fourth Circuit opinion?

MR. PANITZ: The Fourth Circuit opinion is right on point.

[6] THE COURT: Right on point but maybe not right on the law.

MR. PANITZ: Well, we disagree with that.

THE COURT: What happened on that as far as cert.? Is there an effort to get cert. on that?

MS. BROWN: No, Your Honor.

THE COURT: Okay. Go ahead.

MR. PANITZ: You referred to the Supreme Court narrowing the construction of 1346. Perhaps you're referring to the Donelan [phonetic] case, United States versus Donelan. In that particular case, however, the Court found that it was not jurisdiction because the plaintiff in that case failed to do certain specific things, such as filing an administrative claim for refund.

THE COURT: How about in Nordic Village? Does the unequivocal expression of elimination of sovereign immunity, as you insist upon is the expression in the statutory text—"if clarity does not exist there, it cannot be supplied in that case by a committee report."

MR. PANITZ: Your Honor, as far as explicit language, nothing could be more explicit than 1346 when it says, "any Internal Revenue tax which is alleged to have been erroneously, or illegally collected." The parties stipulated in this case that the taxes are erroneously, illegally collected.

[7] THE COURT: There's no question about that. It's a question of whether a nontaxpayer can do anything about it.

MR. PANITZ: But in 1346, it doesn't limit it just to a taxpayer, Your Honor. 1346 doesn't expressly say, "This statute is jurisdictional only for taxpayers."

If you were to read the opinion in Newness, the Eastern District of Texas, they go through a whole litany of cases that have been decided on this issue, and in their opinion, the Fourth, the Fifth, the Sixth, and the Ninth Circuits have all held for the taxpayer in this matter.

THE COURT: All right. Anything additional, or do you want me to have the Government argue, and then you can respond?

MR. PANITZ: Yes, Your Honor.

MS. BROWN: I don't think it needs to be an extensive argument on behalf of the Government. I think it comes down basically to whether or not the sovereign immunity had been waived, and the Government's position is, no, in agreement with the Seventh Circuit, the Fifth Circuit, and the Second Circuit. It comes down to whether or not there is a waiver of sovereign immunity for nontaxpayers under 1346.

Looking at the Supreme Court—and they have repeatedly and repeatedly emphasized that it is a narrow waiver of sovereign immunity. I agree with the Court that the equities are not in our favor, but it is the law we have to [8] look at. In this case, the Second Circuit, the Fifth Circuit, and the Seventh Circuit decisions should be followed by this Court.

THE COURT: All right. Anything additional?

MR. PANITZ: Well, as far as the Fifth Circuit, Your Honor, the Newness case was decided in the Fifth Circuit and cites favorable case law in the Fifth Circuit, so I dispute whether the Fifth Circuit is against us.

There is a whole list of cases in the Fifth Circuit that are apparently in conflict, but I believe that higher cases in that Circuit were in our favor. I think, though, what is most important to this Court is which way is the Ninth Circuit going to go, and I think that the Ninth Circuit—

THE COURT: If you expect that I'm going to anticipate which way the Ninth Circuit is going to go, you're going to have to go up with me and poll the judges. I don't mean that derogatorily, but I really don't think, frankly, it is going to be a question of what the Ninth Circuit does. I agree that there aren't very many cases is the only reason the Supreme Court wouldn't take it, but there is going to be a clear split.

MR. PANITZ: Yes, I agree with Your Honor. I believe there is going to be a clear split in the Circuits. But as far as the Ninth Circuit, I believe that the right way to go in this case is to do equity to the taxpayer. Here the [9] taxpayer's taxes were erroneously collected. There's no doubt that she didn't owe the tax.

THE COURT: I know this wouldn't happen in the Ninth Circuit, but in some Circuits there might be one group of judges that are very concerned about the equity to the taxpayer, and there might be another group of judges that are terribly concerned about a strict ruling of sovereign immunity, and so it's very difficult to tell what the Court of Appeals is going to do.

MR. PANITZ: But in this particular case, the taxpayer has absolutely no remedy if it is not under 1346.

THE COURT: I understand that. There is no remedy here. The Government concedes there's no remedy here. Congress has attempted to create some remedy, but it doesn't apply here. There is no question that the plaintiff here is left without a remedy.

MR. PANITZ: If this Court were to rule against her, yes, that would be the case. The Fourth Circuit chose to rule in her favor, as did the Eastern District of Texas in the Fifth Circuit. In a case such as this, plaintiff should be extended jurisdiction under 1346(a)(1).

THE COURT: Do we just extend jurisdiction and find a waiver of immunity in all cases where the plaintiff is left without a remedy?

MR. PANITZ: No, Your Honor, only in cases where [10] there is a stipulation that the tax has been erroneously collected.

THE COURT: Why don't we just forget taxes? In any waiver of sovereign immunity case, there are many instances where if there is not a waiver the plaintiff has no remedy against the United States.

MR. PANITZ: In this case, we can look specifically to the language of the statute in 1346 and see where the language states that, "There is jurisdiction conveyed if the tax was erroneously collected and only in that instance."

THE COURT: You think that is an explicit statement for a nontaxpayer?

MR. PANITZ: Your Honor, if Congress wanted to limit that statute, they could have easily added the language.

THE COURT: That's the other side of the argument.

MR. PANITZ: But they did so in 7426.

THE COURT: Yes, I know, but you are saying because they didn't say something, they must have meant to confer standing, and that appears to be what the Supreme Court is saying you can't do. It has to be an explicit expression.

MR. PANITZ: But, Your Honor, in 7426 they expressly state "taxpayer." In 1346 and in 7422—

THE COURT: They don't say it.

MR. PANITZ: —it's a person, a person who is erroneously collected against.

[11] In this case, Ms. Rabin-Williams was erroneously collected against.

THE COURT: Okay, I am going to give you a written memorandum on this since I think you will probably have it somewhere else to deal with.

Did we get a trial date on this?

MS. BROWN: Yes, we do, Your Honor.
THE COURT: What's the trial date?
MR. PANITZ: June 30.
THE COURT: I am going to vacate the trial date.
MR. PANITZ: Thank you.
MS. BROWN: Thank you, Your Honor. And you will give us a new trial date also, Your Honor?
THE COURT: If there is going to be a new trial date, I'll state it in the Order. It seems to me the matter is resolved on these—
MR. PANITZ: I believe Counsel agrees on that matter, Your Honor. This is purely a legal issue.
THE COURT: The only thing that I wish it were—well, let me get a statement from both of you on the record. I wish it were on stipulated facts, rather than cross-motions for summary judgment. It's sort of hard to avoid that in the Circuit if it's on stipulated facts.
I assume that you both believe that under either one's theory of the case, there is no triable issue of fact.
[12] MS. BROWN: I'm sorry, I didn't catch—there is no what of facts?
THE COURT: Triable issue of fact.
MS. BROWN: Correct, Your Honor.
MR. PANITZ: I think we have a full stipulation of the facts in the case, Your Honor.
MS. BROWN: I believe if you look very closely, their facts are copied word for word from our facts.
THE COURT: But you call it Cross-Motions for Summary Judgment, so I assume that while it is labeled that, we agree now that this is really a stipulated fact trial tried on the facts as set forth in the memorandum.
MR. PANITZ: That's correct, Your Honor. We are just arguing over standing.
THE COURT: Okay, fine. Thank you very much.
MS. BROWN: Thank you very much, Your Honor.

(Proceedings adjourned.)

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